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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ANZHEY BARANTSEVICH,

Plaintiff and Respondent,

v.

CJSC VTB CAPITAL ASSET
MANAGEMENT et al.,

Defendants and Appellants.

B252858

(Los Angeles County
Super. Ct. No. SC120897)

APPEAL from an order of the Superior Court of Los Angeles County, Richard Stone, Judge. Reversed with directions.

Sidley Austin, Catherine Valerio Barrad; María D. Meléndez for Defendant and Appellant CJSC VTB Capital Asset Management.

Law Offices of R. Thomas Wire and R. Thomas Wire for Defendant and Appellant Beau Cameron.

Jerry L. Freedman and Jerry L. Freedman, Eugene M. Rubinstein for Defendant and Appellant CJSC Beau Laboratories.

Horvitz & Levy, Jeremy B. Rosen, John F. Querio, Lisa M. Freeman for Plaintiff and Respondent.

Defendant CJSC VTB Capital Asset Management (VTB Capital AM) appeals from the trial court's denial of its special motion to strike the complaint of plaintiff Anzhey Barantsevich pursuant to the anti-SLAPP (strategic lawsuit against public participation) statute, Code of Civil Procedure section 425.16, joined by the other appearing defendants.¹ Plaintiff Barantsevich sued the defendants for fraud, conspiracy to defraud, conversion, unfair business practices, intentional infliction of emotional distress, and breach of fiduciary duty. The defendants' special motion to strike argued that all of the causes of action must be dismissed because their principal thrust challenges constitutionally protected activity.

The trial court denied the motion, holding that the thrust of the complaint's claims involves conduct that is not protected, and the allegations of protected activity are merely incidental to the claims of unprotected conduct. In this appeal the defendants challenge that ruling.

Background²

1. The complaint's allegations

Plaintiff Barantsevich is a resident of Los Angeles. Sometime before 2006, he entered into a joint venture with defendant Beau Cameron to develop revolutionary visual-effects software for the movie industry. In 2008, the joint venture was joined by others, including the VTB Group defendants, including VTB Capital AM.

In connection with the commitment of defendant VTB Capital AM to invest in the software project, the defendants required that various entities be established. Beau Cameron, Inc. was owned by plaintiff and Beau Cameron. ZAO Beau Laboratories

¹ All statutory references are to the Code of Civil Procedure unless otherwise indicated.

² We state the complaint's factual allegations rather than those recited in the trial court's challenged ruling, which is drawn largely from a federal district court's statement of the facts in earlier litigation between the parties. We do not attempt to reconcile apparent inconsistencies or contradictions, and we refer to the defendants collectively except where differentiation is necessary.

(ZAO), a Russian corporation, was owned 50 percent plus one share by Beau Cameron, Inc., and 50 percent minus one share by VTB Bank, the parent company of VTB Capital AM. Beau Laboratories Los Angeles (Beau Labs LA), a company wholly owned by ZAO, was formed to receive the invested funds, and to develop the software. Plaintiff became Beau Labs LA's chief financial officer, secretary and treasurer; Cameron became its president. Plaintiff and Cameron also became its sole directors. Plaintiff, Cameron, and representatives of the VTB Group sat on the board of directors of ZAO.³

Plaintiff secured a \$7 million financing commitment, to be invested by VTB Capital AM in Beau Labs LA, from a fund administered by one of Russia's largest banks, VTB Bank. However, VTB Bank representatives insisted that plaintiff cause Beau Labs LA to contribute \$1 million of the invested funds to designated Russian software companies (Vestax and Bigland) as a finder's fee to a ZAO board member, to fulfill a requirement that some of the invested funds be spent in Russia. The VTB Bank representatives' representations were false. The funds paid to Vestax and Bigland were actually illegal kickbacks, approved by the defendants.

Plaintiff was instructed by the defendants to report to the ZAO board and Russian government auditors that the Beau Labs LA funds he wired to Bigland and Vestax were legitimate research and development costs. The ZAO board, and Cameron as a member of both the ZAO board and the Beau Labs LA board, approved these expenditures. Later, however, Cameron falsely denied knowing about the payments to Russian software companies; after removing plaintiff from the Beau Labs LA board of directors, the

³ ZAO filed its notice of appeal and civil case information sheet in this appeal under the name CJSC Beau Laboratories. Its only brief merely joined in the opening brief of its co-appellant VTB Capital AM. On June 8, 2015, after the appeal was fully briefed, this court granted the unopposed motion Jerry L. Freedman, APC, for leave to withdraw as counsel for CJSC Beau Laboratories in this appeal; however this court has received no substitution of counsel for CJSC Beau Laboratories, or for ZAO. For this reason we are compelled to dismiss the appeal filed on these parties' behalf. (*Merco Constr. Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 730; *Caressa Camille, Inc. v. Alcoholic Beverage Control Bd.* (2002) 99 Cal.App.4th 1094, 1101-1102 [unrepresented corporation cannot appear or represent itself in superior court].)

defendants accused him of stealing the funds to conceal their own wrongdoing and to minimize their investment in the project. Plaintiff later learned that the charges of wrongdoing against him were part of an effort by the defendants to freeze him out of the software project, by funding lawsuits falsely accusing him of theft and of deceiving the Russian government and investors, all in order to coerce him to forfeit his interest in Beau Cameron, Inc. and the software project, out of “fear of facing potential criminal charges and civil lawsuits.” As part of that effort, “Defendants complained to Federal authorities” about plaintiff’s supposed theft of funds, in an unsuccessful effort to have him arrested. They approved Cameron’s diversion of funds and equipment from Beau Labs LA, “to fund litigation between Cameron and plaintiff in efforts to bankrupt plaintiff or leave him penniless to defend himself or pursue this litigation or inform investors” of the defendants’ criminal and civil wrongs.

These preliminary allegations are incorporated into each of the complaint’s six causes of action, which allege the defendants’ liability for fraud, conspiracy to defraud, conversion, unfair business practices, intentional infliction of emotional distress, and breach of fiduciary duties.

2. The anti-SLAPP motion

VTB Capital AM, joined by defendants Beau Cameron and Beau Laboratories, filed a special motion to strike plaintiff’s complaint in its entirety. The motion contended that plaintiff’s claims arise from the complaint’s allegations that the defendants fomented and funded various lawsuits against him, and attempted to instigate his criminal prosecution by federal and state authorities, in order to coerce plaintiff to abandon his interest in the software project and to cover up their own wrongdoing.⁴ These allegations, the motion contended, bring the complaint within the anti-SLAPP statute, section 425.16, requiring that each of the causes of action must be stricken.

⁴ We disregard, as not relevant to this appeal, the parties’ characterizations of other lawsuits, both past and pending, apparently involving many of the same parties and issues in federal and state courts.

3. Trial court's denial of the anti-SLAPP motion

The trial court denied the anti-SLAPP motion on October 29, 2013, concluding that the thrust and gravamen of plaintiff's claims is not the protected activity to which section 425.16 applies.

The court outlined the procedure it followed in ruling on the section 425.16 motion: Under the statute's two-step process, "the court first decides 'whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. . . . If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim.'" The defendant has the initial burden to make a prima facie showing on the first of these issues; if it is successful, the burden shifts to the plaintiff to satisfy the second requirement by proffering facts sufficient to support a judgment in the plaintiff's favor.

The court held that the complaint's six causes of action do not arise from protected activity to which section 425.16 applies. Expressing some concern that the fifth cause of action (for intentional infliction of emotional distress) appears "somewhat" to rest only on the defendants' protected activity—allegations that the defendants' funded and encouraged litigation against plaintiff—the court's concern was nevertheless alleviated because the complaint's preliminary allegations also include "numerous misdeeds by Defendant separate and apart from funding the prior litigation." These include accusing plaintiff of theft, assisting in his termination from Beau Labs LA's employment, and freezing him out of decision-making for the software-development project, all in order to conceal the defendants' own wrongdoing and make it difficult or impossible for him to pursue claims against them. The court concluded that "the funding and encouraging of litigation was just part of how that was done," concerning "far more" than the defendants' encouragement and funding of the prior litigation (although conceding that the bulk of plaintiff's claimed damages consist of his expenses in that litigation).⁵

⁵ The trial court's decision does not mention the pleading's allegations of the defendants' liability resulting from their efforts to instigate his arrest by making accusations of theft to state and federal authorities.

Because the complaint's claims are based on allegations of both constitutionally protected and unprotected conduct, the court held, they are "mixed" causes of action, subject to being stricken under section 425.16, "'unless the protected conduct is merely incidental to the unprotected conduct,'" and requiring the court to determine "which is the primary claim and which allegations are 'incidental or collateral.'" The trial court concluded that the complaint's allegations of conduct that is protected under section 425.16 was merely incidental to the allegations of unprotected conduct. The moving defendants therefore failed to carry their initial burden "to make a prima facie showing that any of the subject claims are subject to section 425.16." Based on that ruling, the court declined to consider whether plaintiff had shown a likelihood of prevailing on the merits of his claims.

4. The appeal

Defendant VTB Capital AM, joined by Beau Cameron and Beau Labs LA, filed timely appeals following the trial court's denial of the anti-SLAPP motion. The order denying the special motion to strike is an appealable order. (§§ 425.16, subd. (i); 904.1, subd. (a)(13).)

Discussion

"A SLAPP suit—a strategic lawsuit against public participation—seeks to chill or punish a party's exercise of constitutional rights to free speech and to petition the government for redress of grievances. [Citation.] The Legislature enacted . . . section 425.16—known as the anti-SLAPP statute—to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056; see *Tamkin v. CBS Broadcasting, Inc.* (2011) 193 Cal.App.4th 133, 142.) Section 425.16 permits a defending party to file a special motion to strike any cause of action that arises from an act in furtherance of the defendant's constitutional right of petition or free speech: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in

connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” (§ 425.16, subd. (b)(1).) The statute’s purpose is to curtail the chilling effect of meritless lawsuits on the valid exercise of free speech and petition rights. (§ 425.16, subd. (a); *Schaffer v. City and County of San Francisco* (2008) 168 Cal.App.4th 992, 997-998.)

The trial court ruled that Barantsevich’s allegations do not come within the terms of this provision.

In order to come within the terms of section 425.16, the defendants’ motion must show as a threshold matter that under the challenged cause of action, the defendants’ alleged liability arises from activity in furtherance of the defendants’ right of free speech or petition. (§ 425.16, subds. (b), (e).) Upon that showing, the burden shifts to the plaintiff to establish a probability of prevailing on the claim. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) If the plaintiff fails to make that showing, the motion to strike the cause of action must be granted and the prevailing defendant is entitled to recover its attorney fees and costs. (§ 425.16, subd. (c).)

I. Standard of Review and Burden of Proof

An order denying a special motion to strike under the anti-SLAPP law is reviewed de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.) Whether the anti-SLAPP statute applies to the allegations of the plaintiff’s complaint, and whether the plaintiff presented competent evidence sufficient to show a probability of success on the merits, are legal questions that are subject to the court’s independent review. (*Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 961.) We review the trial court’s evidentiary rulings for abuse of discretion. (*Molenda v. Department of Motor Vehicles* (2009) 172 Cal.App.4th 974, 986.)⁶

⁶ Under the abuse of discretion standard, the appellate court will disturb discretionary trial court rulings only when “a clear case of abuse” and “a miscarriage of justice” are shown. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331; *Denham v. Superior*

In reviewing the applicability of the anti-SLAPP statute “[w]e consider ‘the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based.’ [Citation.] However, we neither ‘weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant’s evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.’” (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

It is the defendant’s initial burden to make a prima facie showing that the plaintiff’s challenged causes of action are subject to section 425.16. (*Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1042.) If the defendant has made that showing, the burden shifts to the plaintiff to establish a probability of prevailing on the merits, with a prima facie showing of facts which would, if credited, support a judgment in the plaintiff’s favor on those claims. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999.) These issues (whether section 425.16 applies and whether the plaintiff has shown a probability of prevailing) are determined separately by the trial court, and are reviewed separately on appeal. (*ComputerXpress, Inc. v. Jackson, supra*, 93 Cal.App.4th at p. 999.)

II. Section 425.16 requires the court to strike causes of action in which liability is alleged to arise from protected conduct.

Section 425.16’s purpose is to curtail the chilling effect that meritless lawsuits may have on the valid exercise of the rights of free speech and petition. By its express terms, the statute is to be interpreted broadly to accomplish that goal. (§ 425.16, subd.

Court (1970) 2 Cal.3d 557, 566.) A trial court abuses its discretion only when it “exceeds the bounds of reason, all of the circumstances before it being considered.” (*Denham v. Superior Court, supra*, 2 Cal.3d at p. 566; *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773.)

(a); *Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1547.)⁷

The question in this appeal is whether the allegations of liability and damages for the defendants' wrongdoing in each cause of action arise from the defendants' protected speech or petitioning activity, thereby bringing them within the anti-SLAPP statute. (§ 425.16; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76.) We conclude that they do.

III. The complaint alleges liability and damages arising from wrongdoing by the defendants that comes within the anti-SLAPP statute's protections.

Subdivision (e) of section 425.16 explains the meaning of the reference in subdivision (b)(1) of that section, to a cause of action "arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." Such an act includes "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (*Id.*, subd. (e).) The court's initial inquiry in ruling on a special motion to strike under section 425.16 therefore is whether the defendant has made the threshold showing that the challenged cause of action arises from the defendants' protected

⁷ Subdivision (a) of section 425.16 provides in full: "The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly."

conduct—conduct in furtherance of its constitutional right of petition or free speech. (§ 425.16, subd. (b)(1); *Rusheen v. Cohen*, *supra*, 37 Cal.4th at p. 1056.)

Protected conduct under section 425.16 includes litigation activity, conduct designed to instigate enforcement of the law, and communications with governmental agencies concerning alleged law violations. (*Dickens v. Provident Life & Accident Ins. Co.* (2004) 117 Cal.App.4th 705, 714; *Premier Medical Management Systems, Inc. v. California Ins. Guarantee Association* (2006) 136 Cal.App.4th 464, 475; *ComputerXpress, Inc. v. Jackson*, *supra*, 93 Cal.App.4th 993.) It includes initiation of complaints to governmental agencies. (*Dove Audio v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777; *Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 368.) And it includes prosecuting or funding civil lawsuits. (*Rusheen v. Cohen*, *supra*, 37 Cal.4th at p. 1056; *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 17-19 [acts encouraging or funding litigation constitute conduct in exercise of the constitutional right of petition].) Allegations of conduct or communications concerning issues before governmental bodies or proceedings are subject to the anti-SLAPP statute without any showing that the subject communications relate to an issue of public importance. (*Briggs v. Eden Council For Hope & Opportunity* (1999) 19 Cal.4th 1106, 1113-1114.)

A. The complaint alleges “mixed” causes of action in which liability and damages arise from both protected and unprotected conduct.

The trial court expressly found, and plaintiff does not dispute, that each of the complaint’s six causes of action alleges conduct by the defendants, some of which constitutes protected activities in furtherance of their rights of free speech and to petition under the federal and state Constitutions. As the trial court concluded, “Plaintiff’s causes of action are ‘mixed’ causes of action, that is, they are based in part on a protected act and based in part on nonprotected acts.” (See *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 672 [causes of action based on allegations of wrongful acts that are both protected and unprotected are “mixed” causes of action].)

Support for the court’s mixed-cause-of-action conclusion is found in the complaint’s preliminary allegations, which identify as “wrongful acts” the defendants’ funding of a lawsuit against plaintiff, and their attempts to instigate his arrest by federal authorities—conduct in furtherance of the defendants’ constitutional rights of petition and free speech. Because these preliminary allegations are incorporated into each of the complaint’s causes of action, each cause of action alleges the defendants’ funding of litigation against plaintiff and their attempts to instigate his arrest—acts that are protected under section 425.16—in addition to the specific allegations contained in each cause of action.

Each cause of action also contains specific allegations of protected conduct.

1. Each cause of action specifically alleges liability and damages arising from conduct protected under the anti-SLAPP statute.

1st Cause of Action, for fraud

The complaint’s first cause of action alleges various acts constituting the defendants’ fraud, by causing plaintiff to pay illegal kickbacks using ZAO’s and Beau Labs LA’s invested funds, by causing Beau Labs LA to fire him and remove him from its board of directors, and by causing plaintiff to lose his decision-making role in the software project. It specifically alleges that to commit these acts the defendants implicated plaintiff in “an alleged crime,” accused him of theft, and funded litigation against him. The resulting damages are alleged to exceed \$5 million, including the “large legal fees” plaintiff incurred “defending [against] false claims”—apparently including the claims allegedly made to governmental authorities, and in the lawsuits against plaintiff funding by the defendants.

2nd Cause of Action, for conspiracy

The second cause of action alleges that the defendants conspired to wrongfully accuse plaintiff of theft, to defame him and terminate his employment with Beau Labs LA, and to freeze him out of decision-making for the software-development project—actions that the preliminary allegations and the first cause of action alleged were accomplished at least in part through protected conduct: their funding of litigation

against plaintiff, and their attempts to instigate his arrest. As in the first cause of action, the alleged damages are again alleged to include the “large legal fees” plaintiff incurred “defending [against] false claims.”

3rd Cause of Action, for conversion

The third cause of action claims that the defendants converted plaintiff’s interest in the joint venture’s software, equipment, and monies, damaging the value of his equity interest in the joint venture by authorizing the ZAO board “to fund litigation against Plaintiff,” which they accomplished by removing him from positions of control, refusing to investigate the alleged kickbacks, and demanding he forfeit his joint venture interest in order to avoid the expense of defending against their civil lawsuits. As damages it alleges that by converting funds “used to litigate against Plaintiff” and to impair his joint venture interest, he “has incurred large legal fees defending [against] false claims”

4th Cause of Action, for unfair business practices

The defendants’ unfair business practices are alleged to include “the acts of accusing Plaintiff of having stolen” funds from Beau Labs LA, and specifically that the defendants “falsely represented to . . . Federal and state prosecutors . . . that Plaintiff stole from them,” apparently in order to instigate his arrest. The fourth cause of action seeks injunctive relief to prevent the defendants from engaging in the alleged misconduct—including enjoining the defendants from complaining to federal and state prosecuting authorities; and it seeks restitution for the impact of the misconduct on plaintiff.

5th Cause of Action, for intentional infliction of emotional distress

The fifth cause of action seeks compensatory and punitive damages for the defendants’ infliction of emotional distress, supported by allegations of “outrageous” conduct consisting of the defendants’ accusations of plaintiff’s theft of funds, their funding of litigation against him, and their pursuit of his prosecution for crimes.

6th Cause of Action, for breach of fiduciary duties

The sixth cause of action alleges that the defendants breached their fiduciary duties to refrain from impairing plaintiff’s joint venture interest, to the joint venture’s detriment or for their personal gain. They breached their duties by the conduct alleged in

the first and other causes of action, including specifically by conspiring to pressure plaintiff to forfeit his joint venture interest “or face false charges that he stole money . . . and possible criminal prosecution.” As in other causes of action, his \$5 million of alleged damages include the large legal fees he incurred “defending [against] false claims.”

Plaintiff’s claims of liability supporting each of the complaint’s six causes of action therefore rest in part on express allegations of conduct by the defendants that is within the protections of section 425.16. And his claimed damages include the attorney fees he incurred defending against the lawsuits asserting those protected claims.

2. Each cause of action also alleges liability arising from conduct that is not protected under section 425.16.

In addition to the protected conduct identified above, the complaint’s preliminary allegations of the defendants’ “wrongful actions” include conduct that the trial court characterized as “numerous misdeeds by Defendants separate and apart from funding the prior litigation.”⁸ They allege the defendants’ wrongful accusations of theft by plaintiff to persons and entities other than federal authorities, their removal of plaintiff from Beau Labs’ employment and board of directors, and the defendants’ conduct in freezing him out of the software project’s decision-making, all in order to conceal their own wrongdoing. These alleged misdeeds are reiterated in each cause of action.

B. The protections of section 425.16 apply to mixed causes of action unless the underlying protected activity is merely incidental to the claim of liability and damages.

Because the conduct alleged in each cause of action includes some conduct that is within the protections of the anti-SLAPP statute, we must determine whether the challenged claims arise from protected activity—broadly construed—notwithstanding

⁸ As noted above, the trial court’s decision does not mention or address the pleading’s allegations that the defendants not only wrongfully funded litigation against plaintiff, but also wrongfully complained to governmental authorities and attempted to instigate his arrest.

that each claim also alleges some unprotected conduct. In order to invoke the anti-SLAPP statute, a defendant must show that the challenged cause of action arises from alleged conduct in furtherance of the defendant's right of petition or free speech. (§ 425.16, subd. (b)(1); *ComputerXpress, Inc. v. Jackson*, *supra*, 93 Cal.App.4th at pp. 1001, 1003.)

Although it correctly recognized that the complaint's claims are "mixed" causes of action, the court concluded that the defendants failed to make a *prima facie* showing that any of the complaint's six causes of action are subject to section 425.16. The question whether the anti-SLAPP statute applies to a cause of action—whether the cause of action arises from alleged conduct in furtherance of the defendant's right of petition or free speech—does not depend on the number of allegations of conduct that is or is not protected. "In the anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity." (*Episcopal Church Cases* (2009) 45 Cal.4th 467, 477; *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) The question is whether protected activity, is "the gravamen or principal thrust" of the action. (*Episcopal Church Cases*, *supra*, 45 Cal.4th at p. 477.) "In assessing whether a cause of action arises from protected activity, "we disregard the labeling of the claim [citation] and instead 'examine the *principal thrust* or *gravamen* of a plaintiff's cause of action . . .'" (*Hunter v. CBS Broadcasting, Inc.* (2013) 221 Cal.App.4th 1510, 1520.) "[I]t is the *principal thrust* or *gravamen* of the . . . cause of action that determines whether the anti-SLAPP statute applies." (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188.) The claim is subject to section 425.16 "unless the protected conduct is 'merely incidental' to the unprotected conduct.'" (*Haight Ashbury Free Clinics, Inc. v. Happening House Ventures*, *supra*, 184 Cal.App.4th at p. 1551; *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP*, *supra*, 133 Cal.App.4th at p. 672; *Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 414.)

The test, however, is not abstract. "We assess the principal thrust by identifying '[t]he allegedly wrongful and injury-producing conduct . . . that provides the foundation

for the claim” —the “core injury-producing conduct upon which the plaintiff’s claim is premised.” (*Hunter v. CBS Broadcasting, Inc.*, *supra*, 221 Cal.App.4th at p. 1520; *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1287 [mixed causes of action are subject to special motion to strike if “at least one of the underlying acts is protected conduct”].) For the anti-SLAPP statute to apply, “the defendant’s act underlying the plaintiff’s cause of action must *itself* have been an act in furtherance of the right of petition or free speech.” (*City of Cotati v. Cashman*, *supra*, 29 Cal.4th at p. 78; *Hunter v. CBS Broadcasting, Inc.*, *supra*, 221 Cal.App.4th at p. 1520.)

In *Haight Ashbury Free Clinics, Inc. v. Happening House Ventures*, *supra*, 184 Cal.App.4th 1539, the court held that a cause of action is subject to the anti-SLAPP statute if liability is asserted and damages are sought for protected conduct, and the protected conduct provides an independent basis for liability. In that case more than a dozen instances of unprotected conduct supported each cause of action; but each cause of action was also supported by two instances of protected conduct. Because each claim alleged liability for the protected conduct, the court held, the protected conduct cannot be considered “merely incidental” to the unprotected conduct. If only the protected activity had been alleged, “the cause of action would certainly be subject to the SLAPP statute, under the theory that premising liability on those acts would chill the exercise of free speech and petition.” (*Id.* at p. 1551.) Adding allegations of unprotected conduct that would also support liability “does not eliminate or reduce the chilling effect on the exercise of free speech and petition: defendants still face the burden of litigation and potential liability for acts deemed protected by the SLAPP statute.” (*Ibid.*; *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 308 [purposes of the SLAPP statute cannot be frustrated by combining allegations of protected and nonprotected activity in single cause of action].)

That analysis is supported by earlier decisions. (*Haight Ashbury Free Clinics, Inc. v. Happening House Ventures*, *supra*, 184 Cal.App.4th at p. 1551 & fn. 7.) In *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, for example, the court held that because the defendants’ protected conduct (reports to governmental agencies) formed

a substantial part of the factual basis for the alleged defamation and trade libel, the claims were subject to the anti-SLAPP statute even though they were supported also by unprotected statements. (*Id.* at p. 104.) And in *Salma v. Capon, supra*, 161 Cal.App.4th 1275, the court held that a mixed cause of action arose from protected activity, because it was based in part on protected activity that was “not merely incidental to the allegations of unprotected conduct.” (*Id.* at p. 1288; see *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP, supra*, 133 Cal.App.4th at p. 673 [protected conduct alleged is not peripheral or incidental to unprotected conduct, because complaint alleged substantial losses caused by protected conduct].)

The key issue in determining whether the anti-SLAPP statute applies therefore is not the degree to which the cause of action rests on nonprotected conduct, but depends instead on whether the conduct for which liability and damages are claimed is an act in furtherance of the right of petition or free speech. (*City of Cotati v. Cashman, supra*, 29 Cal.4th at p. 78 [“cause of action . . . arising from” means that conduct underlying the cause of action “must *itself* have been an act in furtherance of the right of petition or free speech”]; *Navellier v. Sletten, supra*, 29 Cal.4th at p. 92.)

C. The allegations of the defendants’ protected activity in support of each cause of action are not merely incidental to the claims of unprotected conduct or to the pleading’s claims of liability and damages.

Having concluded that the complaint alleges some protected speech or petitioning activity, the trial court was required to consider—and we must consider—which of the causes of action “arise from” the protected activity. The trial court ruled that none of the complaint’s causes of action “arise from” the alleged protected activities, because the protected conduct is merely incidental to unprotected activities that constitute the “thrust” of the complaint’s allegations.

The appealing defendants contend that the trial court erroneously applied the test for determining the action’s gravamen and thrust, by looking to whether the alleged *unprotected* conduct constitutes a basis for liability, rather than whether the allegations of *protected* activity constitute a basis for liability. In this case, the defendants contend,

conduct that is protected under the anti-SLAPP statute forms the basis for liability and damages in each of the complaint's causes of action, rendering the claims subject to the anti-SLAPP statute. (*Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 Cal.App.4th 1532, 1537.) The conclusion that claims of protected activity are "merely incidental" cannot be reached without determining whether the *protected* activity alleged constitutes activity giving rise to the claimed liability, and by which damages are alleged to have been caused. An allegation of protected conduct that forms a basis for liability and damages under the alleged cause of action cannot be found to be "merely incidental" to the claim. (*Id.* at p. 1537.)⁹

In this case the defendants have met their threshold burden of establishing, as to each cause of action, that "the allegedly wrongful and injury-producing conduct that provides the foundation for the claims" includes conduct that is protected under the anti-SLAPP statute. (*Castleman v. Sagaser* (2013) 216 Cal.App.4th 481, 490-491 [in determining thrust or gravamen of cause of action, the court focuses on "the allegedly wrongful and injury-producing conduct that provides the foundation for the claims"].) Each cause of action rests on allegations that the defendants acted fraudulently and breached duties they owed to plaintiff, by accusing him of theft to state and federal authorities in order to instigate his arrest, and by funding litigation against him. These allegations are the conduct by which the defendants are claimed to have accomplished the

⁹ Plaintiff's reliance on *Renewable Resources Coalition, Inc. v. Pebble Mines Corp.* (2013) 218 Cal.App.4th 384, is misplaced. There, the defendants contended they were being sued for protected complaints to an administrative agency about the plaintiff's alleged elections law violations. The Court of Appeal held, however, that the "allegedly wrongful and injury-producing conduct"—the gravamen of the action—was not the administrative complaint, but was the defendants' wrongful purchase of the plaintiff's confidential documents. (*Id.* at p. 396.) That case is distinguishable here. Here, the protected conduct (funding litigation, making complaints of criminal violations to governmental agencies, and seeking plaintiff's arrest) is not merely incidental or preliminary to the fraud and other claimed wrongdoing—the protected conduct is the means by which the defendants are alleged to have perpetrated the alleged fraud and breaches of duties, resulting in plaintiff's loss of the value of his alleged joint venture interest, and expense of the litigation funded by the defendants' protected conduct.

divestiture of his interest in the software project—the wrongs allegedly giving rise to his liability. They also constitute the conduct that plaintiff alleges resulted in the bulk of his damages, and that should be enjoined by the injunctive relief sought by his complaint. They are not merely incidental to the claims of fraudulent conduct and breaches of duty; rather, the defendants’ protected activities are—as the court phrased it in its ruling on the motion—“part of how the [wrong] was done.”

The wrongful, injurious conduct identified in the complaint—“how the [wrong] was done”—constitutes conduct that is protected under the anti-SLAPP statute; the defendant’s act underlying the plaintiff’s cause of action therefore is “*itself* . . . an act in furtherance of the right of petition or free speech,” establishing that the claim arises from the protected conduct. (*City of Cotati v. Cashman, supra*, 29 Cal.4th at p. 78; *Old Republic Construction Program Group v. The Boccardo Law Firm, Inc.* (2014) 230 Cal.App.4th 859, 862 [claim arises out of protected conduct if wrongful, injurious act identified in the complaint is protected conduct]; *Healy v. Tuscany Hills Landscape & Recreation Corp.* (2006) 137 Cal.App.4th 1, 5-6 [defendant’s communication was protected “[b]ecause one purpose of the letter” was a protected communication].)

Conclusion

Each cause of action of plaintiff’s complaint relies for its alleged liability and damages to some degree on conduct that is protected under the anti-SLAPP statute. The defendants therefore have met their threshold burden. (*Contemporary Services Corp. v. Staff Pro Inc.* (2007) 152 Cal.App.4th 1043, 1054-1055.) When a cause of action arises from both protected and unprotected acts, the entire cause of action is subject to a motion to strike under section 425.16. (*Fox Searchlight Pictures, Inc. v. Paladino, supra*, 89 Cal.App.4th at p. 308; *Cho v. Chang* (2013) 219 Cal.App.4th 521, 527.)

Because the trial court ruled in this case that the protected activity alleged in support of plaintiff’s claims is merely incidental to the unprotected activity on which each cause of action is based, it did not undertake the second-prong analysis to determine whether plaintiff had met his burden to establish a probability of prevailing on each of his

claims. We decline to undertake this determination in the first instance, and therefore we will remand to the trial court for that determination. (See *Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 95; *Tuszyńska v. Cunningham* (2011) 199 Cal.App.4th 257, 271; *Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1347-1348; *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 568.)

Disposition

The appeal of ZAO Beau Laboratories, also known as CJSC Beau Laboratories, is dismissed.

The defendants' motion to strike portions of the respondent's appendix, and respondent's brief, is denied.¹⁰

The order denying the defendants' special motion to strike under section 425.16 is reversed. The matter is remanded to the trial court with directions to determine whether plaintiff met his evidentiary burden on the second step of the anti-SLAPP analysis, of demonstrating a reasonable probability of prevailing on the merits as to each cause of action; and to grant the special motion to strike each cause of action as to which it determines the plaintiff has not sustained that burden. Appellants shall recover their costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

MOOR, J.*

¹⁰ We disregard portions of the filed documents, and briefs, that rest on matters not before the trial court or otherwise outside of the record relevant to the challenged ruling.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.